Supreme Court, U.S.
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IN THE Supreme Court of the United States

OCTOBER TERM, 1994

NO. _____

IN THE MATTER OF:
TEXAS GENERAL PETROLEUM CORP.,
Debtor.

VAN E. McFARLAND
and McFARLAND & TONDRE,
Petitioners,

versus

STEVEN A. LEYH, TRUSTEE OF THE LIQUIDATING TRUST OF TEXAS GENERAL PETROLEUM CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorney for Petitioner
McFarland & Tondre
and Pro Se

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QUESTIONS PRESENTED FOR REVIEW

The plaintiff below was a trustee of a liquidating trust created as a part of a plan of reorganization of the Debtor. His appointment as trustee was made pursuant to 11 U.S.C. § 1123(3)(B). Plaintiff sued defendants in bankruptcy court asserting the debtor's avoidance powers of 11 U.S.C. §§ 547 & 548. Defendants challenged the bankruptcy court's jurisdiction. Was the claim asserted by the liquidating trust a matter of "private rights" which requires resolution by an Article III court?

The Plaintiff brought its claim outside the statutory limitation period of 11 U.S.C. § 546(a). Unless the expiration of the limitations period extinguished the cause of action, limitations as defense was waived by Defendants as a part of a stipulation. Is 11 U.S.C. § 546(a) a jurisdictional limitation on the avoidance powers?

During appeal, the Plaintiff settled with one of the Defendants for a payment of $10,000.00. Plaintiff claimed only $500.00 of the settlement should be applied to the outstanding judgment. He claimed the remainder of the payment was allocated to settle a motion for sanctions that had been denied months earlier by the Fifth Circuit Court of Appeals. The Court of Appeals held that a non-settling defendant must prove that the Plaintiff's settlement allocation is a fraud, before the Defendant is entitled to a credit. May a plaintiff structure a settlement allowing it a double recovery that binds the non-settling defendant unless the non-settling defendant can prove fraud?

LIST OF PARTIES TO THE PROCEEDING

The undersigned counsel of record certifies that the following were parties.

Van E. McFarland.	Defendant-Petitioner
McFarland & Tondre	Defendant-Petitioner
Steven A. Leyh, Trustee of the Liquidating Trust of Texas General Petroleum Corporation.	Plaintiff--Respondent
Marine Midland Bank N.A.	Trust Beneficiary
Texas General Petroleum Corporation	Debtor
W. E. Bosarge	Third Party Defendant
Brice A. Tondre	Settling Defendant

TABLE OF CONTENTS

Cover Page	1
Questions Presented for Review	2
List of Parties to the Proceeding	3
Table of Contents	4
Table of Authorities	5
References to Opinions Below	7
Grounds for Jurisdiction	7
Statutes Involved	7
Statement of the Case	9
Basis of Federal Jurisdiction in the First Instance	11
Argument for Allowance of the Writ	11
a) *The Exercise of Jurisdiction by the Bankrupcy Court Violated Article III Of the United States Constitution*	11
b) *The Avoidance Power was Extinguished By Operation of Limitations*	14
c) *Plaintiff's Double Recovery*	16

TABLE OF AUTHORITIES

Statutes and Constitutional Provisions:

U.S. Const. Art. III § 1

11 U.S.C. § 1123(b)(3)

11 U.S.C. § 546(a)

11 U.S.C. § 702

11 U.S.C. § 1104

11 U.S.C. § 1163

11 U.S.C. § 1202

11 U.S.C. § 1302

Cases:

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 12

Gower v. Farmers Home Admin., 899 F.2d 1136 (11th Cir. 1990) 13

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 12-14

Lovejoy v. Murray, 70 U.S. (3 Wall) 1, 17 (1865) 17

Martin v. First Nat'l Bank, 829 F.2d 596 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988) 15

Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, (1956) 11

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co, 458 U.S. 50, 87 (1982) 12

Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985) 12

Williams v. United States, 289 U.S. 553 (1933) 12

OPINIONS BELOW

The opinion of the bankruptcy court is published at 122 B.R. 306 (S.D. Tex. 1990). The opinion of the district court is unpublished. The opinion of the Court of Appeals for the Fifth Circuit is published at 40 F.3d 763 (5th Cir. 1994).

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1994. No rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States Constitution Article III Section 1, provides,

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

11 U.S.C. § 1123(b)(3) provides in part,

"(b) Subject to subsection (a) of this section,

a plan may--

...

(3) provide for--

(A) the settlement or adjustment or any claim or interest belonging to the debtor or to the estate;

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest."

11 U.S.C. § 546(a) provides,

"(a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of--

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed."

STATEMENT OF THE CASE

Texas General Petroleum Corporation [the "Debtor"] filed a petition under Chapter 11 of the bankruptcy on March 14, 1983. The order confirming the Second Amended Plan of Reorganization and appointing Leyh as trustee of the subject trust was signed April 23, 1985. On October 15, 1985, the bankruptcy adversary proceeding was filed against Petitioners.

The Plaintiff Leyh sought to use the Debtor's avoidance powers to recover pre-petition monies paid to the law firm of McFarland & Tondre for legal services performed for the Debtor and others. The law firm partners, Van McFarland and Brice A. Tondre, were also sued.[1] The Plaintiff claimed standing based upon an assignment of the debtor in possession's avoidance powers by operation of the Second Amended Plan of Reorganization ["the Plan].

At trial parties stipulated that the issue to be tried was whether Plaintiff had standing to assert the bankruptcy avoidance powers as an assignee of the debtor in possession. The courts below found the Plan ambiguous. The bankruptcy court

---

1. Tondre settled separately during the appeals for the payment of $10,000.00. The Court of Appeals affirmed the District Court's approving only a $500.00 credit to the judgment stating that unless Petitioners demonstrated "fraud" that the parties were entitled to stipulate how the settlement proceeds were to be applied.

accepted parol evidence and determined the drafters of the plan intended to assign Plaintiff the subject avoidance power. Finding standing, the bankruptcy court entered judgment against Defendants.

BASIS OF FEDERAL JURISDICTION IN THE FIRST INSTANCE

The basis of jurisdiction in the first instance was stated to be 28 U.S.C. § 157(b). Petitioners assert that this statutory provision conflicts with Article III of the United States Constitution as interpreted by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*, 458 U.S. 50, 87 (1982) and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55-56 (1989) to the extent it allows a trustee of a private trust created under a plan of reorganization to pursue such claims.

ARGUMENT FOR ALLOWANCE OF WRIT

a) *The Exercise of Jurisdiction by the Bankruptcy Court Violated Article III Of The United States Constitution*

Article III, Section 1 of the United States Constitution directs

> the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

In *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 283 (1956), this Court recognized an exception to Article III Section 1 for a category of claim labeled "public rights." The public rights doctrine emerged from the idea that a claim arising from the waiver of sovereign immunity "is no part of the judicial power vested in

the constitutional courts by the third article." *Williams v. United States*, 289 U.S. 553, 580-81 (1933).

Prior to 1985, the public rights exception to Article III was limited to controversies between the government and others. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989)(Scalia concurring).[2] Although, not without criticism,[3] the public rights doctrine was extended by this Court to include matters which "could be conclusively be determined by the Executive and Legislative Branches." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985).

In the bankruptcy context, this Court has twice addressed the public rights doctrine. In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69 (1982), this Court struck down the jurisdictional provision of the 1978 Bankruptcy Act as contrary to Article III. In *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 55-56 (1989) the Court stated that the resolution of fraudulent transfer claims was a matter of "private rights" as oppose to "public rights." It held the concomitant right to a jury trial could not be eliminated. *Id.*

---

2. In his concurring opinion, Justice Scalia argued it is a mistake to diverge from or expand this one hundred year old exception doctrine. *Granfinanciera, S.A.*, 492 U.S. at 65-72.

3. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)(Scalia, J. dissenting).

In the present case, the Court of Appeals properly identified the issue to be determined-- that is whether the subject claim was the assertion of a public rather than a private right. 40 F.3d at 770. It further acknowledged that this Court's opinion in *Granfinanciera S.A. v. Nordberg*, "leaves the constitutional exercise of bankruptcy jurisdiction open to serious question." 40 F.3d at 770 n.7, *quoting, Gower v. Farmers Home Admin.*, 899 F.2d 1136, 1140 n. 9 (11th Cir. 1990). It, however, declined to follow the Court's discussion in *Granfinanciera*. It characterized the Court's opinion, quoted below, as "dictum." 40 F.2d at 770 n.7.

> [A] bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions....
>
> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees--suits which, we said in *Schoenthal v. Irving Trust Co.*, 287 U.S. at 94-94 [citation omitted], "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it." -- are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a

> bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. [citation omitted]. They therefore appear matters of private rather than public right.

Granfinanciera S.A., 492 U.S. at 55-56.

In the present case, the Plaintiff was not the "trustee" of the Debtor, Texas General Petroleum Corporation. He was the "trustee" of an entity called Texas General Petroleum Corporation Liquidating Trust. This is not a trustee appointed under 11 U.S.C. §§ 702, 1104, 1163, 1302, or 1202. *See* 11 U.S.C. § 546. It is a private trust created as a part of a plan of reorganization. The Plaintiff argued standing as an 11 U.S.C. § 1123(3)(B) representative of the debtor estate. As stated by the Fifth Circuit, the dispute was between two private individuals. 40 F.3d at 770. The dispute was not a right "which belongs to or exists against the Federal Government." *Granfinanciera S.A.*, 492 U.S. at 56. Therefore, "it must be adjudicated by an Article III court." *Id.* The Court of Appeals erred in disregarding this Court's opinion.

b) *The Avoidance Power was Extinguished By Operation of Limitations*

A second jurisdictional issue is raised by 11 U.S.C. § 546(a). The statute provides:

> An action or proceeding under section 544, 545, 547, 548 or 553 of this title

> may not be commenced after the earlier of--
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

The avoidance claim was not brought within the statutory period. As stated by the Court of Appeals, Petitioners' trial counsel waived limitations by stipulation unless limitations is a jurisdictional bar or the remedy was extinguished prior to its attempted transfer. If the right extinguished, the transfer was ineffective, the Plaintiff lacked standing, and the bankrupcy court lacked subject matter jurisdiction. 40 F.3d at 771.

Limitations on the avoidance powers are two years from the date of filing of the petition under Chapter 11. The Sixth Circuit previously held limitations a jurisdictional bar:

> [i]f a complaint seeking to avoid a preferential or fraudulent transfer is not filed in accordance with section 546(a), a bankruptcy court has no jurisdiction to hear the action.

Martin v. First National Bank, 829 F.2d 596 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988). The Fifth Circuit disagreed and declined to follow the Sixth Circuit.. 40 F.3d at 771.

The avoidance powers of 11 U.S.C. § 544 *et seq.*

are statutorily created remedies. The statute itself limits the time in which such actions can be brought. The statutory remedy was created and exists only for the period of time Congress set forth.

The Sixth Circuit approach is the correct analysis, and follows the statute. The fraudulent transfer power asserted in this proceeding had been extinguished by operation of 11 U.S.C. § 546(a) prior approval of the Debtors' Second Amended Plan of Reorganization, and before the adversary was filed. Accordingly, the non-existent claim could not be transferred to the plaintiff. The Bankruptcy Court lacked subject matter jurisdiction.

c) *Plaintiff's Double Recovery*

During the appeal, the Plaintiff settled his claim with a co-defendant Brice Tondre for $10,000.00. Petitioners sought a credit for this settlement payment. The district court credited only $500 to the judgment because the Plaintiff offered a copy of a release given to Tondre which recited $500.00 would be applied to settlement of the outstanding judgment and $9500.00 as a release from claims relating to a motion for sanctions which was denied almost five months prior to the release. The Fifth Circuit held:

> In this case, McFarland was not a party to the settlement negotiations that resulted in a settlement between the Liquidating Trustee and Tondre. The Liquidating Trustee then offered as proof the settlement, which stipulated

> the allocation of damages. The burden returns to McFarland. He responds by noting that the Fifth Circuit denied the Liquidating Trustee's June 4, 1992 Motion for Sanctions on June 26, 1992. Furthermore, the Liquidating Trustee executed the release on November 16, 1992, almost five months after we denied the motion for sanctions. What McFarland suggests is that the release's consideration of the motion for sanctions amounts to fraud. We refuse to reach such a conclusion absent additional evidence.

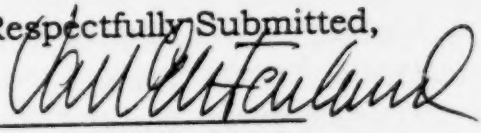
40 F.3d at 773. The implications of this holding are far reaching. A plaintiff settling with a jointly defendant would be encouraged to structure the settlement in a manner which affords it a double recovery. In this case, the consideration was claimed to be paid in settlement of a previously denied motion for sanctions. In other cases, the possibilities are limited only by the imagination of the attorneys.. Under the Fifth Circuit's holding, a plaintiff does not have to provide evidence that the putative settled claim has value. Instead, a non-party to the settlement negotiations has to prove fraud. This is not the standard. *Lovejoy v. Murray*, 70 U.S. (3 Wall) 1, 17 (1865).

CONCLUSION

Petitioners pray that the Court reverse and vacate the judgment of the bankruptcy court, instruct it to dismiss for want of jurisdiction, or

alternatively reverse with instructions to modify the judgment to give credit for the payment by a co-defendant, and for such other and further relief as is just.

Respectfully Submitted,



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APPPENDIX 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
TEXAS GENERAL PETROLEUM CORPORATION
CASE NUMBER 83-01132-H3-5

THE LIQUIDATING TRUST OF
TEXAS GENERAL PETROLEUM
CORPORATION
versus
McFARLAND & TONDRE,
VAN E. McFARLAND, II and
BRICE A. TONDRE
ADVERSARY NUMBER 85-0838-H3
(REPORTED AT 122 B.R. 306)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LETITIA Z. CLARK, Bankruptcy Judge.

To the extent any findings of fact herein are construed to be conclusions of law, they are hereby adopted as such. To the extent any conclusions of law herein are construed to be findings of fact, they are hereby adopted as such.

1. On March 14, 1983, Texas General Petroluem Corporation, the Debtor, filed a petition for relief under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of Texas, Houston, Texas.

2. After the filing by TEXAS GENERAL

PETROLEUM Corporation of its petition for relief, a Chapter 11 liquidating plan of reorganization was proposed by Debtor, and confirmed by this court.

3. A plan of reorganization, in confirmed form, functions like a contract as the debtor and all creditors are bound by the plan. 11 U.S.C. s 1141; See, e.g., In re *308 White Farm Equipment Co., 38 B.R. 718 (Bankr.N.D.Ohio 1984).

4. The plan provided for transfer of various assets of the Debtor, including certain causes of action, to a liquidating trust, which was to be disbursed for the benefit of unsecured creditors, and provided that certain other assets would not be transferred. The particular asset in question here is not specifically addressed in the plan. McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre contend that it was not transferred, and thus that plaintiff herein lacks standing.

5. Having heard the testimony and other evidence presented, the court concludes that this defense derives from inartful drafting and the question becomes one of intent.

6. It now appears that there existed, even prior to confirmation of the plan of reorganization of TEXAS GENERAL PETROLEUM Corporation, certain causes of action by virtue of 11 U.S.C. ss 547 and 548, which causes of action were not addressed in Exhibit "B" to the confirmed plan (which contained a description of assets of the Liquidating Trust created by the plan), nor in Exhibit "F" of the confirmed plan (which contained a description of assets retained by the reorganized debtor).

7. In particular, according to the credible testimony of attorney Sterling Minor, a participant in the plan drafting, the wrongful payments asserted by the adversary plaintiff against the adversary defendants in this proceeding were believed, at the time of the drafting of the plan, to give rise to a cause of action thought to be a s 547 action.

8. It is now clear that at the time of drafting of the plan, none of the parties to the plan understood that the relationship between the present Debtor and its predecessor and affiliate corporations might make it difficult or impossible to bring s 547 actions against certain defendants. This problem derives from the fact that the entity that paid McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre, was not the entity billed by McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre. Thus, the appropriate action lay in 11 U.S.C. s 548, not 11 U.S.C. s 547. The action now is regarded by the parties as not a simple cash preference (s 547) because the antecedent debt was actually not owed by the present Debtor. Thus, the cause of action could only be brought as a fraudulent transfer under s 548.

9. None of the parties to the plan of reorganization thought to address what entity would receive what can be referred to as "the rest, residue and remainder" of the causes of action not specifically addressed by the plan as passing to the liquidating trust or remaining with the Debtor.

10. It is clear from the testimony of Dan Johnston, a credible witness for the adversary

plaintiff and a participant in the plan drafting, that not all existing causes of action were addressed in Exhibits "B" and "F" to the plan of reorganization. His testimony further demonstrated that the causes of action that were wanted by Marine Midland Bank, the principal secured creditor, were very specific, and that the action against the adversary defendants in this proceeding was not one sought by Marine Midland Bank.

11. Accordingly, this court must determine where the remaining causes of action not specifically addressed by the plan of reorganization, fell.

12. To determine the intent of the participants in the plan, this court finds that the parol evidence rule does not here require exclusion of the testimony of Johnston and Minor. The parol evidence rule is not and does not purport to be, a rule of interpretation. It is a rule of substantive contract law and not a rule of evidence which is exclusionary. Corbin on Contracts, ss 573, 579. Where a writing is ambiguous, and the court here determines that the plan and corresponding order are ambiguous with regard to the subject dispute, the court will hear how the parties contend a writing should be interpreted, which process includes oral testimony. Corbin on Contracts, ss 554A-554C, 579 Supplement. The meaning to be discovered and applied is that which each party had *309 reason to know would be given to the words by the other party. Corbin on Contracts, s 579. The evidence admitted on the meaning of the plan need not and does not here vary or contradict

the terms of the plan, but is an aid to the court in interpreting the meaning that each party knew would be attributed to it.

13. The court concludes that the intent of the Debtor as a party to the plan of reorganization was to retain specific causes of action for specific and rather ignoble purposes, such as to protect the chief executive officer of the corporate Debtor from suit.

14. Based upon the evidence presented in the testimony of Dan Johnston and Sterling Minor, witnesses for the plaintiff, and upon this court's construction of the grammar of the contested plan language, and upon the court's findings as to the intent of the parties to the plan, the court concludes that the "rest, residue, and remainder" of the existing causes of action not specifically addressed by the plan, including all preference and fraudulent transfer actions not specifically addressed, were to fall to the Class 5 Creditors. These creditors in any event were never going to be paid one hundred cents on the dollar, and were taking whatever causes and other assets the Debtor and Marine Midland Bank were not insisting on having.

15. The court concludes that paragraph 7.1 of the confirmed plan of reorganization and order confirming plan, can be interpreted to include all of those actions described, created and sanctioned in ss 542 through 553 of the Bankruptcy Code. More particularly, this court concludes that paragraph 7.1 of the confirmed plan and order confirming plan reflect the intent of the parties to the plan that they

contemplated conveyance to or retention by the Liquidating Trust of all of those causes of action, even if they did not manage to express that intent in a precisely articulate manner in paragraph 5.5.3 of the confirmed plan.

16. The court concludes that it was the intent of all the parties to the confirmed plan of reorganization of the Debtor, at the time the agreements underlying the plan were made, at the time the plan was drafted, and at the time the plan was confirmed, that the remaining, then existing causes of action not specifically addressed by the plan fell to the creditors described as "Class 5 Creditors" in the plan of reorganization, and thus to the Liquidating Trust.

17. The court having previously found the plan language unclear on this point, and parol evidence proper to be considered, the court finds that the intent of the parties was that the Liquidating Trust established by the plan of reorganization receive all the residue and remainder of causes of action existing at the time of plan confirmation which were not specifically allocated to the reorganized Debtor or to Marine Midland Bank. The court also finds that the parties inartfully intended the term "cash preferences" identified in Exhibit "B" to the plan to include the avoidance of fraudulent transfer actions addressed in 11 U.S.C. s 548.

18. Accordingly, the adversary plaintiff, the Liquidating Trust of TEXAS GENERAL PETROLEUM Corporation, and its court appointed Trustee, Steven A. Leyh, has standing to assert the cause of action described in its second amended

complaint, under 11 U.S.C. s 548, against the adversary defendants, and the adversary plaintiff is the owner of the cause of action.

19. Pursuant to the "Stipulation" filed March 31, 1989 and executed by the parties to this proceeding, plaintiff is entitled to recover from and be awarded a judgment in his favor against defendants in the amount of $12,210.25, the sum sought to have been recovered by plaintiff pursuant to 11 U.S.C. s 548, in plaintiff's Second Amended Complaint. (Docket No. 174.)

20. The underlying facts which formed the basis of this action, and the Stipulation, addressed the Debtor's transferring to defendants, McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre, an interest in the Debtor's property, namely cash, in the form of a payment from Debtor's operating account funds in the sum of $12,210.25, in February, 1983, in *310 response to an invoice to W.E. Bosarge, Jr., for services to him. The transfer was within one year of March 14, 1983, when Debtor filed Bankruptcy. Bosarge was, among other titles, President of Debtor at the relevant time.

21. As a result of the Stipulation of March 31, 1989, the court need make no further findings of fact with regard to the elements which constitute a s 548 fraudulent transfer action.

22. The s 548 action of the Liquidating Trust of TEXAS GENERAL PETROLEUM Corporation against defendants, MCFARLAND & Tondre, Van E. MCFARLAND, II and Brice A. Tondre, is not barred by any applicable statute of limitations or the

doctrine of laches.

23. The Liquidating Trust of TEXAS GENERAL PETROLEUM Corporation, through its Trustee, Steven A. LEYH, is entitled to avoid the fraudulent transfer found by this court, and is entitled to the relief prayed for in the plaintiff's second amended complaint.

SIGNED at Houston, Texas on this 18 day of April, 1990.

/s/Letitia Z. Clark

APPENDIX 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
TEXAS GENERAL PETROLEUM CORPORATION
CASE NUMBER 83-01132-H3-5

THE LIQUIDATING TRUST OF
TEXAS GENERAL PETROLEUM
CORPORATION
versus
McFARLAND & TONDRE,
VAN E. McFARLAND, II and
BRICE A. TONDRE
ADVERSARY NUMBER 85-0838-H3
(NOT REPORTED)

Came an for consideration the defendants', Mc.Farland & Tondre, Van E. McFarland, 11 and Brice A. Tondre, Motion for Entry of Judgment and after reviewing the pleadings, the trial proceedings, and 'the briefs filed by the parties, the court makes the following findings of fact and conclusions of law and enters a separate Judgment in conjunction herewith. To the extent any findings of fact herein are construed to be conclusions of law, they are hereby adopted as such. To the extent any conclusions of law herein are construed to be findings of fact, they are hereby adopted as such.

Trial on the above adversary proceeding was concluded on June 14, 1989. The issue for resolution before the court waswhether plaintiff had

standing to assert a cause of action under 11 U.S.C. § 548-pursuant to the language contained in the Plan of Reorganization and related Order creating the subject trust. On June 14, 1989, the court stated findings of fact and conclusions of law into the record, holding that plaintiff did have the requisite standing and thus, pursuant to the parties' prior Stipulation (Docket No. 174) plaintiff was entitled to recover from and be awarded a Judgment in his favor against defendants in the amount sought to be recovered by plaintiff, pursuant to Section 548.

Defendants claim, in their Motion for Entry of Judgment, that the court committed error in denying their previous request for jury trial per the recent case of *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989), on which opinion issued after this court's announcement of Findings of Fact and Conclusions of Law from the bench. Defendants move for Judgment as a matter of law.

This court finds the *Granfinanciera* opinion to be inapplicable to the present case. Accordingly, the defendants' Motion for Entry of Judgment is denied. The *Granfinanciera* opinion holds, *inter alia,* that in an action for recovery of a fraudulent conveyance per 11 U.S.C. § 548, where the defendant had not filed a proof of claim, the parties are entitled to a trial by jury. The issue, which this court resolved in the present case was whether the Trustee had standing to maintain an action for fraudulent conveyance pursuant to 11 U.S.C. § 548, according to the language of the Plan of Reorganization and related trust Order. The

issue for resolution was not whether there was a fraudulent conveyance.

The parties stipulated on the issue of whether the underlying facts constituted a fraudulent conveyance. The stipulation stated that if this court found that the Trustee had standing, the Trustee would have a judgment for the amount sued for under § 548. Thus the parties had stipulated to the resolution of the issue to which Granfinanciera would have applied. (Stipulation filed March 31, 1989, Docket No. 174.) The question addressed by this court was the question of standing of the Trustee of the liquidating trust the Debtor created by the Plan. Resolution of this question by the Bankruptcy Court is an appropriate exercise of its traditional equity jurisdiction in the adjustment of the debtor-creditor relationship.

In addition, this court finds that the holding in *Granfinanciera, supra,* is not applicable since the Supreme Court opinion was issued on June 23, 1989, subsequent to this Court's ruling in its findings of fact and conclusions of law stated into the record as of June 14, 1989. This court rendered its judgment in this case as of June 14, 1989, the date trial of this matter was held. Although F.R.C.P. 58 (incorporated into B.R. 9021) provides for court approval of the form of judgments and the subsequent entry of same by the clerk, the purpose of the rule and of the entry of Judgments on the court records is for the parties to be apprised of the contents of the Judgment and once it is entered, to be apprised of when the time

for appeal begins to run. In the instant case, the purpose of F.R.C.P. 58 has been fulfilled, as the court's ruling from the bench after trial informed the parties of the contents of the Judgment. As the formality of writing of the Judgment by the court and entry of that Judgment by the Clerk had not yet been performed, the time for appeal had not begun to run until entry of that written Judgment.

Based upon the foregoing, this court finds that the defendants' Motion for Entry of Judgment should be denied. A form of Judgment will be entered as to that Motion, and a separate form of Judgment will be entered resolving the trial, pursuant to the court's findings of fact and conclusions of law.

SIGNED at Houston, Texas on this 18 day of April, 1990.

/s/ Letitia Z. Clark

APPENDIX 3

IN RE:
TEXAS GENERAL PETROLEUM CORPORATION
CASE NUMBER 83-01132-H3-5

THE LIQUIDATING TRUST OF
TEXAS GENERAL PETROLEUM
CORPORATION
versus
McFARLAND & TONDRE,
VAN E. McFARLAND, II and
BRICE A. TONDRE
ADVERSARY NUMBER 85-0838-H3
(NOT REPORTED)

On the 14th day of June, 1989, the above styled and numbered adversary proceeding came on for trial. The Liquidating Trust of Texas General Petroleum Corporation, the adversary plaintiff, appeared by and through. its attorney of record.

McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre, the adversary defendants, appeared by and through their attorney of record.

After hearing the evidence and arguments of counsel, this court announced Findings of Fact and Conclusions of Law from the bench, and holds that the Liquidating Trust of Texas General Petroleum Corporation, through its Trustee, Steven A. Levh, should recover from defendants, Mc.Farland & Tondre, Van E. McFarland,II, and Brice A. Tondre, jointly and severally, the amount of $12,210.25, in addition to prejudgment legal interest at the rate of seven and eightv-seven hundreths percent (7.871)

compounded annually on the amount of $12,210.25, from October 15, 1985 until June 14, 1989. It is accordingly, Adjudged that plaintiff, the Liquidating Trust of Texas General Petroleum Corporation, through its Trustee, Steven A. Leyh, recover from defendants Mc.Farland & Tondre, Van E. McFarland, II and Brice A. Tondre, jointly and severally, the sum of $12,210.25, in addition to prejudgment legal interest at the rate of seven and eighty-seven hundreths percent (7.87%) compounded annually on the amount of $12,210.25, from October 15, 1985 until June 14, 1989, together with post-judgment interest on both such awards, at the rate of eight and thirty-two hundreths (8.32%) interest per annum from date of entry of this Judgment until this judgment is paid in full.

All costs of court expended or incurred in this action, are adjudged against defendants McFarland & Tondre, Van E. McFarland, II and Brice A. Tondre, jointly and severally. Each party shall bear its own attorneys' fees.

All writs and processes for the enforcement and collection of this judgement or the costs of court shall issue as necessary.

SIGNED, at Houston, Texas on this 18 day of April 1990.

/s/ Letitia Z. Clark

APPENDIX 4

IN RE:
TEXAS GENERAL PETROLEUM CORPORATION
VAN E. McFARLAND, et al.,
versus
THE LIQUIDATING TRUST OF TEXAS
GENERAL PETROLEUM CORPORATION
STEVEN A. LEYH, TRUSTEE
CIVIL ACTION NUMBERS
H-90-1842 AND
H-90-2209
(NOT REPORTED)

MEMORANDUM

MELINDA HARMON, DISTRICT JUDGE

This is an appeal of a Judgment entered by the Honorable Leticia Z. Clark on April 18, 1990 (Document #4). This Court has jurisdiction over this bankruptcy appeal pursuant to 28 U.S.C. section 158(a). After considering the briefs submitted by the litigants, the record of the proceeding, and the applicable law, the Court is of the opinion that the Memorandum and Order of the Bankruptcy Court should be affirmed.

I. THE RELEVANT FACTUAL BACKGROUND

This appeal arose from the Bankruptcy Court's judgment in an adversary proceeding. In this proceeding, the plaintiff, the Liquidating Trust of Texas General Petroleum Corporation (the "Liquidating Trust"), through its court appointed trustee, Steven A. Leyh, invoked 11 U.S.C. § 548 (interchangeably referred to as "the Fraudulent

transfer cause of action" or "Section 548 cause of action") to set aside a transfer of the Debtor's funds from the Debtor to the Appellants, the Defendants below.

On March 14, 1983, Texas General Petroleum Corporation, (the "Debtor") , filed a petition for relief under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Southern District of Texas, Houston, Texas. Subsequently, the Debtor proposed a Chapter 11 liquidating plan of reorganization (the "Plan") which was confirmed by the Bankruptcy Court. The Plan provided for the transfer of various assets of the Debtor, including certain causes of action to the Liquidating Trust. These assets were described in Exhibit "B" to the Plan and were to be disbursed for the benefit of the unsecured creditors. The Plan also provided that certain other assets described in Exhibit "F" to the Plan would not be transferred to the Liquidating Trust and were to be retained by the Debtor.[1] But the Plan did not specifically address what entity would receive "the rest, residue and remainder" of the causes of action that were addressed neither in Exhibit "B" nor Exhibit "F. On October 15, 1985, the Liquidating Trust initiated a

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1. Paragraph 7.1 of the Plan provides:
The Reorganized Debtor shall retain that property described on Exhibit "F." Among the property of the estate hereby distributed to the Trust are those claims and causes of action listed or described on Exhibit "B."

fraudulent transfer action[2] against Appellants to recover the Debtor's funds in the amount of $12,210.25. Debtor transferred this sum of money to the Appellants to pay for the services rendered by Appellants to a former officer of the Debtor's parent company. The payment was made on March 7, 1983, seven days prior to the bankruptcy filing. This fraudulent transfer cause of action was addressed neither in Exhibit "B" to the Plan (which contained a description of the assets of the Liquidating Trust created by the Plan), nor in Exhibit 'IF" to the Plan (which contained a description of the assets retained by the Debtor).

On May 2, 1986, the Bankruptcy Court conducted a docket call but the Appellants failed to appear. The Bankruptcy Court entered a default judgment in favor of the Liquidating Trust. The Appellants appealed the Bankruptcy Court's default judgment and other orders to the District Court. The District Court, the Honorable G.K. McDonald, consolidated the appeals and reversed the Bankruptcy Court's default judgment. The Liquidating Trust then appealed the District Court's order to the Fifth Circuit asserting that the District Court lacked jurisdiction. The appeal was denied.

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2. The Liquidating Trust initially invoked a Section 547 actionagainst the Appellants. The Bankruptcy Court subsequently recharacterized this cause of action stating that because this cause of action was not a simple cash preference claim; it should be brought as a fraudulent transfer cause of action under § 548. See 11 U.S.C. §§ 547, 548.

On remand, the adversary proceeding was set to trial before the Bankruptcy Court. Immediately prior the trial, the Appellants and the Liquidating Trust entered into a written stipulation providing that the only issue to be tried was whether the Liquidating Trust lacked standing to assert the Section 548 cause of action. The stipulation further provided that in the event such issue was determined in favor of the Liquidating Trust, then the Liquidating Trust would be entitled to recover from the Appellants the amount of $12,210.25.

At the commencement of trial, the Bankruptcy Court approved the stipulation and denied the Appellants' request for jury trial. The Bankruptcy Court heard the evidence presented, including testimony from participants in the drafting of the Plan. The Bankruptcy Court interpreted the contested language in the Plan. It concluded that paragraph 7.1 of the Plan and the Order confirming the Plan reflected the intent of the parties to the Plan. It concluded that the parties intended that the "the rest, residue and remainder" of the causes of action not specifically addressed by the Plan (including all actions described, created, and sanctioned in §§ 542 through 553 of the Bankruptcy Code) fell to "Class 5 Creditors" in the Plan, and thus to the Liquidating Trust. Accordingly, the Bankruptcy Court found that the Liquidating Trust and its Trustee, Steven A. Leyh, had standing to bring a Section 548 cause of action against the Appellants.

Pursuant to the parties' stipulation and based upon its findings of fact and conclusions of law, the Bankruptcy Court entered a judgment in Liquidating Trust's favor. The Appellants filed a motion to vacate and for new trial which was denied by the Bankruptcy Court. This appeal followed.

II. THE PRIMARY ISSUES ON APPEAL

The primary issues on appeal are: 1) Whether the Bankruptcy Court erred in finding that the Liquidating Trust had standing to sue the Appellants; 2) Whether the Bankruptcy Court had jurisdiction to adjudicate the dispute between the parties; 3) Whether the Appellants were entitled to have the disputed issue decided by a jury; and 4) Whether the Bankruptcy Court erred in disregarding the stipulation by awarding pre-judgment interest.

III. THE STANDARD OF REVIEW

On appeal a Bankruptcy Court's findings of fact will only be overturned if there are clearly erroneous. Bankruptcy Rule 8013. The Court may, however, exercise plenary review with respect to legal conclusions.

IV. THE APPLICABLE LAW

1. The Bankruptcy Court Did Not Err In Finding that The Liquidating Trust Had Standing to Sue The Appellants

The Appellants assert that the Bankruptcy Court erred in finding that the Liquidating Trust had standing to assert a Section 548 cause of action against them.

A plan of organization, in confirmed form,

functions like a contract. 11 U.S.C. § 1141. See e.g., In re White Farm Equipment Co., 38 Bankr. 718 (Bankr. N.D. Ohio 1984). Thus, interpretation of an ambiguous plan is just like interpretation of an ambiguous contract; it is a question of fact for the fact finder. See Jhaver v. Zapata Off-Shore Co., 903 F.2d 381, 384 (5th Cir. 1990). Like a contract, if a plan is ambiguous, relevant extrinsic or parole evidence may be admitted to clarify the intent of the parties. See e.g., id.

At trial the issue of whether the Liquidating Trust had standing to bring a Section 548 action against the Appellants was tried by the Bankruptcy Court, acting as a fact finder. The Bankruptcy Court heard testimony of witnesses Dan Johnston and Sterling Minor. The Bankruptcy Court examined and interpreted Paragraphs 5.5.3 and 7.1 of the Plan. The Bankruptcy Court found that the parties to the Plan intended that the "the rest, residue and remainder" of the causes of action not specifically addressed by the Plan fell to "Class 5 Creditors" in the Plan, and thus to the Liquidating Trust. The Bankruptcy Court concluded that the Liquidating Trust and its Trustee, Steven A. Leyh, had standing to bring a Section 548 claim against the Appellants.

The Bankruptcy Court's findings of fact are therefore supported by the record. These findings of fact are not to be overturned unless they are clearly erroneous. Bankruptcy Rule 8013.

2. The Bankruptcy Court Had Jurisdiction to Adjudicate the Dispute Between the Parties

The Appellants assert that the Bankruptcy Court did not have jurisdiction to adjudicate the dispute between the parties. They assert that the power to adjudicate private rights can only be vested in an Article Three Court.

The Liquidating Trust is operated by the trustee appointed by the Bankruptcy Court. See 11 U.S.C. § 1123(b)(3(B).

Pursuant to the Plan, the Bankruptcy Court gave the Liquidating Trust and its trustee certain powers to collect and disburse the debtor's assets to a certain class of creditors. In the Plan the Bankruptcy Court also retained jurisdiction of all matters concerning the Plan that would be brought in the future.

Therefore, the Bankruptcy Court clearly had jurisdiction over this matter. Furthermore, pursuant to Section 157 (b) (1) - (2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Bankruptcy Judges may hear, determine, and enter final orders in all core proceedings, including administrative matters, matters involving avoidance powers, and confirmations of plans. See 28 U.S.C. § 157(b)(l)-(2).

Because the issue in the instant case involves the avoidance powers of the Liquidating Trust, the Bankruptcy Court had jurisdiction to adjudicate the dispute between the Liquidating Trust and the Appellants.

3. The Appellants Were Not Entitled to Have The Disputed Issue Decided By A Jury

The Appellant urges that they were entitled to have the disputed issue decided by a jury. However, because they had waived their right to a jury trial, they were not entitled to have such a right.

Bankruptcy Rule 9015 is applicable in this case. Prior to its abrogation in 1987, Bankruptcy Rule 9015 provided in pertinent part:

(b)(1)Time; Form. Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a demand therefore in writing not later than ten (10) days after service of the last pleading directed to such issue. The demand may be endorsed on a pleading of the party. When a jury trial is demanded, it shall be designated by the clerk in the docket as a jury matter.

(c) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5005 constitutes a waiver of a trial by jury.

Bankruptcy Rule 9015.

The former Bankruptcy Rule 9015 was an adaptation of Federal Rule of Civil Procedure 38. Under Federal Rule of Civil Procedure 38, if a person waives the right to be tried by a jury, his amendmentof pleadings not introducing new issues will not revise such a right. See Gualardo v. Estelle, 580 F.2d 748, 753 (5th Cir. 1978). The term "new issues" has been interpreted to mean

new issues of fact and not new theories of recovery. Id. If subsequent pleadings merely expand and develop prior allegations, service of amended pleadings does not extend the time for serving jury demands. See, e.g., Barr v. ARCO Chemical Com., 529 F.Supp. 1275, 1276 (S.D. Tex. 1982). If a person fails to make a timely demand, his waiver is complete even though the waiver is made inadvertently and unintentionally. See Bush v. Allstate Ins. Co., 425 F.2d 393, 396 (5th Cir. 1970).

In the instant case, in the original complaint, the Liquidating Trust raised the issue as to which Appellants now claim a right to jury trial. The Liquidating Trust filed the original complaint on October 15, 1985 alleging that the Appellants should turn over to the Liquidating Trust the sum of $12,210-25, which had been fraudulently transferred to the Appellants by the debtor. on December 19, 1985, the Appellants filed a Rule 12 motion. On January 22, 1986, the Appellants responded to the Liquidating Trust's request for production of documents. On April 25, 1986, the Appellants filed their counterclaim and third party claim. on May 2, 1986, the Liquidating Trust filed its first amended complaint. All of these were pleadings directing to the fact issue of fraudulent transfer raised by the Liquidating Trust's original complaint.

On May 8, 1986 the Appellants for the first time filed their original answer and demand for jury trial. This demand came more than six (6) months after the Liquidating Trust filed its original

complaint, more than five (5) months after the Appellants filed their Rule 12 motion response to request for production of documents, and more than ten (10) days after the Appellants filed their counterclaim and third party claim. Under Bankruptcy Rule 9015, the Appellants had waived their right to a jury trial.

The fact that the Liquidating Trust filed the first amended complaint on May 2, 1986 to add Section 548 cause of action would not extend the time for the Appellants to file a jury demand. The first amended complaint did not introduce new issues of fact. It alleged the same facts as that alleged in the original complaint. A newly added recovery theory under Section 548 of the Bankruptcy Code was pleaded, but no "new issues" of fact had been added. Appellants had waived the right to jury by failure to make a timely demand.

4. The BanKruptcy Court Did Not Err in Disregarding The Stipulation By Awarding Pre-Judgment Interest

The Appellants assert that the Bankruptcy Court erred in disregarding the stipulation by awarding pre-judgment interest.

In Texas, absent contractual provisions for interest, the question of whether interest is allowable under a given set of facts is a question of law. Stall Petroleum Co. v. Phillips Petroleum Co., 550 S.W.2d 360, 365 (Tex. Civ. App.-Amarillo), aff'd, 569 S.W.2d 480 (Tex. 1978).

Furthermore, the parties' stipulations are not considered binding as to issues of law. In re Laesione scruare, Inc., 816 F.2d 1236, 1240-41

(8th Cir. 1987). The Bankruptcy Court was not bound by the parties' stipulation as to the issue of law, and thus, was free to award pre-judgment interest in its discretion.

SIGNED at Houston, Texas, this 30th day of June, 1991.

/S/Melinda Harmon

APPENDIX 5

IN RE:
TEXAS GENERAL PETROLEUM CORPORATION
VAN E. McFARLAND, et al.,
versus
THE LIQUIDATING TRUST OF TEXAS
GENERAL PETROLEUM CORPORATION
STEVEN A. LEYH, TRUSTEE
No. 93-2762
DECEMBER 29 1994
40 F.3d 763

Before POLITZ, Chief Judge, GOLDBERG and DUHE, Circuit Judges. DUHE, Circuit Judge:

Appellants Van E. McFarland and McFarland & Tondre (McFarland) appeal the district court's judgment in favor of Appellee Steven A. LEYH, Trustee of the Liquidating Trust of Texas General Petroleum Corp. (Liquidating Trustee). Debtor Texas General Petroleum Corp. brought this fraudulent conveyance action against McFarland after the bankruptcy court had confirmed Debtor's Chapter 11 plan of reorganization. The Liquidating Trustee ultimately asserted the action in place of Debtor. By stipulation, the only issue at trial was whether the Liquidating Trustee had standing to assert the fraudulent conveyance action. The bankruptcy court answered that question in the affirmative, and the district court affirmed. We affirm but for somewhat different reasons.

BACKGROUND

The bankruptcy court confirmed debtor's plan of reorganization under Chapter 11 of the

Bankruptcy Code in April 1985. In October of that year, the Liquidating Trustee initiated this fraudulent conveyance action against McFarland. The subject of the suit was a $12,210.25 payment made by Debtor to McFarland for legal services performed for a former officer of Debtor's parent company. The parties stipulated that the only issue was the Liquidating Trustee's standing to assert the action. The Plan gave the Liquidating Trustee authority to assert a list of avoidance actions on behalf of the unsecured creditors. The list, however, did not include the fraudulent conveyance action against McFarland. The bankruptcy court determined that the Plan was ambiguous. Using parol evidence, the court concluded that the parties intended the Liquidating Trustee to have the authority to assert on behalf of the unsecured creditors any causes of action not specifically addressed by the Plan. The district court affirmed, concluding that the trial court's interpretation of the ambiguous plan was not clearly erroneous. In addition, the district court determined that the bankruptcy court had jurisdiction to adjudicate the dispute, that McFarland was not entitled to a jury trial, and that the bankruptcy court's award of prejudgment interest was not error. During the litigation, co-defendant Brice Tondre settled with the Liquidating Trustee for $10,000. The district court credited only $500 of the settlement payment to the judgment.

DISCUSSION

On appeal, McFarland claims that the

Liquidating Trustee lacks standing. In addition, McFarland asserts five other issues: (1) the bankruptcy court lacked jurisdiction; (2) limitations extinguished the avoidance action; (3) McFarland was entitled to a jury trial; (4) the award of prejudgment interest was error; and (5) McFarland should have received full credit for the settlement of his co-defendant. We review findings of fact for clear error and legal conclusions de novo. Young v. National Union Fire Ins. Co. (In re Young), 995 F.2d 547, 548 (5th Cir.1993). When the district court has affirmed the bankruptcy court's findings of fact, our review for clear error is strict. Id.

I. Standing

McFarland first contends that the Liquidating Trustee cannot exercise avoidance powers because it is neither the Debtor nor the Trustee. In this case, the Debtor acted as debtor-in-possession, and the bankruptcy court employed no trustee. The Plan created the position of Liquidating Trustee.

McFarland's argument runs counter to Section 1123 of the Code, which allows a plan to provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, [of any claim or interest belonging to the debtor or to the estate]." 11 U.S.C. s 1123(b)(3)(B) (1988). Section 1123(b)(3)(B) allows a plan to transfer avoidance *768 powers to a party other than the debtor or the trustee. Briggs v. Kent (In re Professional Inv. Properties of America), 955 F.2d 623, 626 (9th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 63, 121 L.Ed.2d

31 (1992); Citicorp Acceptance Co. v. Robison (In re Sweetwater), 884 F.2d 1323, 1327 (10th Cir.1989). We agree with the Ninth and Tenth Circuits that a party other than the debtor or the trustee may be authorized by a plan of reorganization to exercise avoidance powers.

Under s 1123(b)(3)(B), a party other than the debtor or the trustee that seeks to enforce a claim must show (1) that it has been appointed, and (2) that it is a representative of the estate. Retail Marketing Co. v. King (In re Mako, Inc.), 985 F.2d 1052, 1054 (10th Cir.1993); In re Hunt, 136 B.R. 437, 444 (Bankr.N.D.Tex.1991). The bankruptcy court's approval of a plan that clearly appoints a stranger to the estate satisfies the first element. Mako, 985 F.2d at 1055; Sweetwater, 884 F.2d at 1326; Nordberg v. Sanchez (In re Chase & Sanborn Corp.), 813 F.2d 1177, 1180 n. 1 (11th Cir.1987). As for the second element, courts apply a case-by-case analysis to determine whether the appointed party's responsibilities qualify it as a representative of the estate. Sweetwater, 884 F.2d at 1326-27. "The primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors." Id. at 1327. The reason for the emphasis on unsecured creditors is that the proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits. Id. Applying this test the Plan clearly appoints the Liquidating Trustee as a representative of the estate to pursue avoidance actions on behalf of unsecured creditors.

Class 5 of the Plan consists of unsecured claimants. The Liquidating Trust is provided for the benefit of Class 5 creditors. Provision 5.5.3 of the Plan establishes the assets of the Liquidating Trust as including "bankruptcy-created or sanctioned causes of action of the debtor-in-possession described or listed in Exhibit B." Exhibit B lists specific avoidance actions. The approved Plan clearly gives the Liquidating Trustee the power to assert avoidance actions. Furthermore, the Liquidating Trustee qualifies as a representative of the estate because the proceeds obtained from its actions benefit the unsecured creditors. We conclude that the Plan gives the Liquidating Trustee authority to enforce avoidance actions on behalf of the estate. The avoidance action that the Liquidating Trustee asserts against McFarland, however, is not found in Exhibit B. McFarland, citing s 1141(b), contends that, because the Plan through Exhibit B does not specifically provide for the fraudulent conveyance action, the ability to exercise that action vests in the debtor.[1] McFarland would apply the § 1141(b) presumption rather than use parol evidence. Avoidance actions, however, are not property of the estate. Harstad v. First Am. Bank, 39 F.3d 898, 902-03, (8th Cir.1994). Section 1141(b) may

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1. Section 1141(b) provides: "Except as otherwise as provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. s 1141(b) (1988).

determine what assets remain property of the estate, but that section has nothing to do with the retention of avoidance actions.[2] In re Harstad, 155 B.R. 500, 510 (Bankr.D.Minn.1993) (subsequent history omitted).

We apply the rules of contract interpretation to the interpretation of a plan of reorganization. See In re Stratford of Tex., Inc., 635 F.2d 365, 368 (5th Cir.1981). The determination of whether a contract is clear or ambiguous is a question of law. Id. If we determine the contract to be ambiguous, the determination of the parties' intent from parol evidence is a question of fact.[3] Id.

Provision 7.1 of the Plan states: "The reorganized debtor shall retain that property

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2. If § 1141(b) applied to avoidance actions, §1123(b)(3)(B), which expressly applies to debtors, would become a nullity. Harstad, 39 F.3d at 902-03 (asking why a debtor would retain a power by using specific language if s 1141(b) gives him that power automatically).

3. Mako requires the evidence of an appointment of a stranger to be clear. 985 F.2d at 1055. The reason for clarity is to protect the unsecured creditors. Id. at 1056. Unsecured creditors want to know whether post confirmation avoidance actions will be initiated and by whom. The clear appointment requirement satisfies their concerns. Neither Mako nor the cases it cites, however, require clear evidence of the particular action sought to be enforced. Stratford supplies the additional analysis when, as in this case, the appointment is clear but the Plan is unclear with regard to the particular action sought to be enforced.

described on Exhibit 'F'. Among the property of the estate hereby distributed to the trust are those claims and causes of action listed or described on Exhibit 'B' (including causes of action created or sanctioned by ss 542-553)." The parenthetical portion of the provision could describe those avoidance actions listed in Exhibit B. Alternatively, the parenthetical could describe the phrase "[a]mong the property of the estate hereby distributed to the trust." Provision 5.5.3 suggests that Exhibit B contains a complete list of the trust's assets. On the other hand, the use of the word "among" in Provision 7.1 suggests that Exhibit B is not exclusive. We agree with the bankruptcy and district courts that the Plan is ambiguous.

To resolve the ambiguity, the bankruptcy court employed parol evidence to determine the intent of the parties. The court found that those avoidance actions not specifically addressed by the Plan belong to the Liquidating Trust. We see no clear error. Furthermore, the result reached by the court comports with the general policy behind the assertion of avoidance actions. The proceeds recovered in avoidance actions should not benefit the reorganized debtor; rather, the proceeds should benefit the unsecured creditors. 5 Collier on Bankruptcy P 1123.02, at 1123-23 (Lawrence P. King ed., 15th ed. 1994). The Liquidating Trust acts on behalf of the Class 5 unsecured creditors. The proceeds from this fraudulent conveyance action will benefit the Class 5 unsecured creditors. We conclude that the Liquidating Trustee has standing to assert a fraudulent conveyance action

against McFarland.

II. Jurisdiction

McFarland contends that the bankruptcy court lacked subject matter jurisdiction under Article III of the Constitution to adjudicate this dispute. The district court glossed over this argument by asserting that the bankruptcy court had jurisdiction by virtue of the Plan and 28 U.S.C. s 157(b)(1).[4] McFarland's argument, however, is based on Article III as interpreted by Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982) (plurality opinion). We must undertake the constitutional analysis.

Marathon struck down the jurisdictional provision of the 1978 Bankruptcy Act. The debtor had brought a state law breach of contract action against a creditor. The Court determined that the suit did not implicate public rights and, thus, must be adjudicated by an Article III judge. The court distinguished "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," from "the adjudication of state-created private rights." Id. at 71, 102 S.Ct. at 2871. To delineate public rights, the court announced two principles: (1) "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in

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4. Section 157(b)(1) gives the bankruptcy courts jurisdiction over core proceedings. A fraudulent conveyance action is an example of a core proceeding. 28 U.S.C. s 157(b)(2)(H) (1988).

which that right may be adjudicated"; and (2) the Article III court must retain the essential attributes of judicial power. Id. at 80-81, 102 S.Ct. at 2876.

In its 1984 Amendments to the Bankruptcy Code, Congress followed the Court's rationale. Bankruptcy courts retained jurisdiction over core proceedings. 28 U.S.C. s 157(b)(1). Congress did not define "core proceeding," but it did provide a nonexclusive list of core proceedings. See id. s 157(b)(2). The list includes fraudulent conveyance actions. Id. s 157(b)(2)(H).

The Ninth Circuit has held a bankruptcy court's exercise of jurisdiction under s 157(b)(2)(H) constitutional. Duck v. Munn (In re Mankin), 823 F.2d 1296, 1309 (9th Cir.1987), cert. denied, 485 U.S. 1006, 108 *770 S.Ct. 1468, 99 L.Ed.2d 698 (1988); see also Hunt, 136 B.R. at 442 (following Mankin). Mankin concerned a state law fraudulent conveyance action brought by the trustee in bankruptcy under s 544(b) of the Code. The Ninth Circuit applied Marathon's two principles and determined that public rights were at issue. On the first principle, the court reasoned that Congress deserved some discretion. Even though state law provided the rule of decision, Congress gave avoidance powers to the trustee "for the purpose of restructuring debtor-creditor relations pursuant to the federal bankruptcy power." Id. Unlike the state law action in Marathon, Congress considered a fraudulent conveyance action to be a core proceeding. Concerning the second principle, the court explained the difference in the appointment of bankruptcy judges under the 1978 Bankruptcy Act

and after the 1984 Amendments. Under the 1978 Act, the President was supposed to appoint bankruptcy judges with the advice and consent of the Senate.[5] Now, Article III judges appoint them. The appointment power gives Article III judges more control over their bankruptcy counterparts. See id.

We agree with the Ninth Circuit's conclusion in Mankin.[6] As we have previously noted, Congress

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5. The President actually never appointed any bankruptcy judges because the portion of the 1978 Act which gave the President that power only became effective on April 1, 1984. See 1978 Bankruptcy Act, Pub.L. No. 95-598, §§ 201(a), 402(b), 92 Stat. 2549, 2657, 2682 (1978). By that time, the Supreme Court had decided Marathon, and Congress had revised the manner of appointment for bankruptcy judges. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, § 104(a), 98 Stat. 333, 336 (1984), codified at 28 U.S.C. s 152(a)(1) (1988). Nevertheless, the plurality opinion in Marathon based its decision on the manner of appointment provided in the 1978 Act. See Marathon, 458 U.S. at 89-90, 102 S.Ct. at 2880-81 (Rehnquist, J., concurring); see also id. at 53, 102 S.Ct. at 2862 (plurality opinion) (discussing the differences between appointment before and after the 1978 Act). Thus, to distinguish Marathon, the Ninth Circuit in Mankin emphasized the difference in appointment as contemplated by the 1978 Act and as practiced under the 1984 Amendments.

6. The case for jurisdiction here is even stronger than that presented in Mankin. In this case, the fraudulent conveyance action is based on federal law, not state law. Because federal law provides the rule of decision, the substantial discretion due Congress under Marathon's

took great pains to incorporate in its 1984 Amendments the varying opinions expressed in Marathon. Wood v. Wood, 825 F.2d 90, 95-96 (5th Cir.1987). Moreover, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587, 105 S.Ct. 3325, 3336, 87 L.Ed.2d 409 (1985). Jurisdiction over the restructuring of debtor-creditor relations requires jurisdiction over property of the estate. Although McFarland and the Liquidating Trustee are two private individuals, the Liquidating Trustee is acting on behalf of the unsecured creditors. For practical purposes, the fraudulent conveyance action instituted on behalf of the estate is as integral to the bankruptcy restructuring process as any other core proceeding. We conclude that the bankruptcy court's exercise of jurisdiction in the fraudulent conveyance action was constitutional.[7]

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first principle definitely applies.

7. McFarland also cites the Supreme Court discussion in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 55-56, 109 S.Ct. 2782, 2797-98, 106 L.Ed.2d 26 (1989). The trustee in bankruptcy in Granfinanciera had brought a fraudulent conveyance action against a creditor. The question presented for the Court was whether the creditor had a right to jury trial. McFarland points to part of Justice Brennan's opinion that appears to treat the fraudulent conveyance action as matter of private rather than public right. Id. at 56, 109 S.Ct. at 2798. The Supreme Court's discussion of public rights,

III. Statute of Limitations

McFarland contends that the Liquidating Trustee's fraudulent conveyance action is barred by limitations. He points to s 546(a) of the Code, which specifies the limitations period for avoidance actions.[8] McFarland did not raise this defense in either the bankruptcy court or the district court. To circumvent the obstacle of waiver, [9] McFarland contends that s 546(a) is a non-waivable jurisdictional provision. Because the issue of subject matter jurisdiction may be raised at any time, we can reach the merits of McFarland's limitations defense if we determine that s 546(a) is a jurisdictional provision. Martin v. First Nat'l Bank (In re Butcher), 829 F.2d 596, 600 (6th

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however, is dictum by its own admission.

The Eleventh Circuit has recognized that the Supreme Court's dictum in Granfinanciera leaves the constitutional exercise of bankruptcy jurisdiction "open to serious question." Gower v. Farmers Home Admin. (In re Davis), 899 F.2d 1136, 1140 n. 9 (11th Cir.1990).

8. Section 546(a) reads: "An action ... may not be commenced after the earlier of--(1) two years after the appointment of a trustee ... or (2) the time the case is closed or dismissed." 11 U.S.C. s 546(a) (1988).

9. The parties stipulated before trial that standing was the only issue before the bankruptcy court. A stipulation of issues at trial binds the parties on appeal. Wilson v. Bailey, 934 F.2d 301, 305 (11th Cir.1991).

Cir.1987), cert. denied, 484 U.S. 1078, 108 S.Ct. 1058, 98 L.Ed.2d 1020 (1988), states that s 546(a) is a jurisdictional provision. If an avoidance action is not brought in accordance with s 546(a), the bankruptcy court has no jurisdiction to hear the action. Id. A few other courts recognize this view. In re Railway Reorganization Estate, Inc., 133 B.R. 578, 581 (Bankr.D.Del.1991); In re Frascatore, 98 B.R. 710, 719 (Bankr.E.D.Pa.1989) (dictum); In re Oro Import Co., 52 B.R. 357, 359(Bankr. S.D.Fla.1985), rev'd on other grounds, 69 B.R. 6 (S.D.Fla.1986). Several recent decisions disagree with Butcher and treat s 546(a) as a true statute of limitations. Amazing Enters. v. Jobin (In re M & L Business Machs.), 153 B.R. 308, 311 (D.Colo.1993); Brandt v. Gelardi (In re Shape, Inc.), 138 B.R. 334, 337 (Bankr.D.Me.1992); see also In re Day, 82 B.R. 365, 366 (Bankr.E.D.Pa.1988) (considering Butcher's view of s 546(a) as a jurisdictional provision to be gratuitous). These courts note that the legislative history of s 546(a) refers to the statute as a statute of limitations, but makes no reference to it as a jurisdictional provision. Other cases add support to this latter view. In Smith v. Mark Twain Nat'l Bank, 805 F.2d 278 (8th Cir.1986), the Eighth Circuit construed s 549(d) of the Code, which is almost identical to s 546(a).[10] The Eighth Circuit

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10. Section 549(d) applies to post-petition transactions. It requires: "An action or proceeding under this section may not be commenced after the earlier of--(1) two years after the date of transfer sought

determined that s 549(d) "has nothing to do with the jurisdiction of the United States federal courts." Id. at 294. Similarly, in Emmons v. Southern Pac. Transp. Co., 701 F.2d 1112 (5th Cir.1983), we construed 45 U.S.C. s 56, the limitations provision of the Federal Employees Liability Act (FELA). The wording of that statute closely resembles s 546(a).[11] We interpreted the FELA provision to be a substantive statute of limitations. Id. at 1117-18.

We respectfully disagree with the Sixth Circuit and conclude that McFarland waived his limitations defense by not raising it in the trial court. As stated supra Part II, the jurisdictional provision of the bankruptcy courts is found at 28 U.S.C. s 157. Nothing in the Code or the legislative history suggests otherwise.

IV. Jury Trial

McFarland contends that the bankruptcy court improperly denied him his Seventh Amendment right to a jury trial. McFarland relies on the Supreme Court's decision in Granfinanciera, which recognized a defendant's right to jury trial in a fraudulent conveyance action asserted under s 548. 492 U.S. at 64, 109 S.Ct. at 2802. The bankruptcy

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to be avoided; or (2) the time the case is closed or dismissed." 11 U.S.C. § 549(d) (1988). The only difference between the two statutes is the point at which the two years begins to run.

11. The first paragraph of the FELA provision states: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. s 56 (1988).

court distinguished Granfinanciera on the basis that the only issue before the court was standing and declined to apply Granfinanciera because that decision was published after the bankruptcy court had *772 announced its findings of fact and conclusions of law. The district court affirmed but for different reasons. The district court concluded that McFarland had waived his right to jury trial. The court applied Bankruptcy Rule 9015, which deems a party's right to jury trial waived if the party does not make a demand within ten days after service of the last pleading directed to such issue.[12] Former Bankruptcy Rule 9015 was adapted from Federal Rule of Civil Procedure 38. The district court applied our Rule 38 cases and determined that McFarland had waived his right to

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12. Bankruptcy Rule 9015 was abrogated in 1987. Before 1987, the Rule provided:

> (b)(1) Time; Form. Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a demand therefore in writing not later than ten (10) days after service of the last pleading directed to such issue. The demand may be endorsed on a pleading of the party. When a jury trial is demanded, it shall be designated by the Clerk in the docket as a jury matter.
>
> ....
>
> (c) Waiver. The failure of a party to serve a demand as required by this rule and to file as required by Rule 5005 constitutes a waiver of a trial by jury. Bankr.R. 9015 (abrogated 1987).

jury trial.[13]

The district court applied our decision in Guajardo v. Estelle, 580 F.2d 748, 753 (5th Cir.1978), to find waiver. In Guajardo, we held that amended pleadings that do not introduce new issues of fact do not renew a right to jury trial that has been waived. Id. In this case, however, McFarland never waived his right to jury trial. The last pleading in Rule 38 usually means an answer or a reply to a counterclaim. McCarthy v. Bronson, 906 F.2d 835, 840 (2d Cir.), aff'd, 500 U.S. 136, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1990). McFarland did not file an answer to the original complaint, but rather filed his answer after the Debtor filed its first amended complaint. Because McFarland filed his jury demand with his original

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13. A history of the pleadings and relevant motions is helpful at this point:

--Oct. 15, 1985: Debtor files complaint against McFarland

--Dec. 19, 1985: McFarland files Rule 12 motion to dismiss

--Jan. 22, 1986: McFarland responds to Debtor's request for production

--Apr. 25, 1986: McFarland files counterclaim and third-party claim

--May 2, 1986: Debtor amends complaint

--May 8, 1986: McFarland answers and demands jury trial

As an aside, debtor brought the complaint and its first amended complaint by and through the Liquidating Trustee. The second amended complaint, filed on December 20, 1988, substituted the Liquidating Trustee for the debtor as the party asserting the action.

answer, he did not waive his right to jury trial, even though he filed his answer almost seven months after being served with the original complaint.

Nevertheless, McFarland has no right to jury trial in this case because Granfinanciera is inapplicable. The question before the bankruptcy court was solely whether the Liquidating Trustee had standing to assert the fraudulent conveyance action. No right to a jury trial arises if no jury issue is presented to the court. See Brook Mays Music Co. v. National Cash Register Co., 838 F.2d 1396, 1399 (5th Cir.1988); see also Pardini v. Southern Nev. Culinary and Bartenders Pension Plan and Trust, 733 F.Supp. 1402, 1405 (D.Nev.1990) (noting that when a particular inquiry usually does not require the resolution of factual issues, no right to a jury trial arises). Whether a plan clearly appoints a stranger as a representative of the estate under s 1123(b)(3)(B) to enforce avoidance actions is generally a question of law. See Mako, 985 F.2d at 1054 (listing two-part test); supra note 3. Furthermore, both parties in their briefs contend that the Plan is unambiguous. The existence of a factual issue is not readily apparent. We conclude that McFarland had no right to a jury trial over the standing issue presented to the bankruptcy court in the stipulation.

V. Prejudgment Interest

McFarland next contends that the bankruptcy court's award of prejudgment interest was error because it was not contemplated by the stipulation. The district court disagreed with McFarland because prejudgment interest is a question of law

over which *773 a stipulation is not binding. The district court, however, applied Texas law in its determination. Federal law governs the allowance of prejudgment interest when a cause of action arises from a federal statute. Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1288 (5th Cir.1994). The standard of review for a trial court's award of prejudgment interest is abuse of discretion. Id. [29] Federal courts apply a two-step analysis to determine whether an award of prejudgment interest is within a court's discretion: (1) whether the federal act that creates the cause of action precludes such an award; and (2) whether such an award furthers the congressional policies of the federal act. Id. The Bankruptcy Code and particularly s 548 are silent with regard to prejudgment interest. The stipulation also is silent with regard to interest. Furthermore, an award of prejudgment interest furthers the congressional policies of the Bankruptcy Code. Section 548 allows the estate to recover fraudulent transfers made within a year before the filing of the bankruptcy petition. The purpose of the Section is to make the estate whole. Prejudgment interest compensates the estate for the time it was without use of the transferred funds. We determine that the bankruptcy court did not abuse its discretion by awarding prejudgment interest.

VI. Credit for Settling Co-defendant

Lastly, McFarland contends that the settlement of co-defendant Tondre with the Liquidating Trustee for $10,000 should have been applied against the outstanding judgment under principles

of joint and several liability. The district court credited only $500 to the judgment because the Liquidating Trustee offered a copy of the release he executed in support of his response to McFarland's motion. The release states that $500 would be applied to the outstanding judgment and that $9500 serves as a release for possible sanctions from this court for an unauthorized appeal.

The burden of proof is on the party claiming the credit "to show that the damages assessed against it have 'in fact and in actuality' been previously covered." Wood v. Diamond M Drilling Co., 691 F.2d 1165, 1171 (5th Cir.1982), cert. denied, 460 U.S. 1069, 103 S.Ct. 1523, 75 L.Ed.2d 947 (1983); see also Cates v. United States, 451 F.2d 411, 417-18 n. 20 (5th Cir.1971). If the nonsettling defendant is not a party to the settlement negotiations, however, he need only show that the plaintiff settled with another party the claim on which the nonsettling defendant is liable. U.S. Indus. v. Touche Ross & Co., 854 F.2d 1223, 1262 (10th Cir.1988). The burden then shifts to the plaintiff to offer proof that the settlement does not provide him with a double recovery. McDermott, Inc. v. Clyde Iron, 979 F.2d 1068, 1080 (5th Cir.1992), rev'd in part on other grounds sub nom. McDermott, Inc. v. AmClyde, --- U.S. ----, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1993); U.S. Indus., 854 F.2d at 1262-63. The best way for a plaintiff to satisfy his burden is to offer as proof the written settlement, which should specifically stipulate the allocation of damages to each cause of action. Hess Oil V.I. Corp. v. UOP, Inc., 861 F.2d 1197, 1209

(10th Cir.1988). Should the plaintiff satisfy his burden, the ultimate burden of proof belongs to the nonsettling defendant. See Wood, 691 F.2d at 1171; Cates, 451 F.2d at 417-18 n. 20. In this case, McFarland was not a party to the settlement negotiations that resulted in a settlement between the Liquidating Trustee and Tondre. The Liquidating Trustee then offered as proof the settlement, which stipulated the allocation of damages. The burden returns to McFarland. He responds by noting that the Fifth Circuit denied the Liquidating Trustee's June 4, 1992 Motion for Sanctions on June 26, 1992. Furthermore, the Liquidating Trustee executed the release on November 16, 1992, almost five months after we denied the motion for sanctions. What McFarland suggests is that the release's consideration of the motion for sanctions amounts to fraud. We refuse to reach such a conclusion absent additional evidence.

CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.

No. 94-1623

Supreme Court, U.S.
MAY 3 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF:
TEXAS GENERAL PETROLEUM CORPORATION,

Debtor.

VAN E. McFARLAND and McFARLAND & TONDRE,

Petitioners,

vs.

STEVEN A. LEYH, TRUSTEE OF THE LIQUIDATING TRUST OF TEXAS GENERAL PETROLEUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit Court of Appeals correctly rule that the United States Bankruptcy Court had jurisdiction to decide the fraudulent transfer cause of action brought by Respondent against Petitioners?

2. Did the Fifth Circuit Court of Appeals correctly rule that the limitations provision of 11 U.S.C. § 546(2) was not a bar to the fraudulent transfer cause of action brought by Respondent against Petitioners?

3. Did the Fifth Circuit correctly rule that Petitioners had not met their burden with regard to a non-settling defendant's entitlement to a credit for monies paid by a settling co-defendant?

LIST OF PARTIES

Respondent:

Steven A. Leyh, Trustee of the Liquidating Trust of Texas General Petroleum Corporation

Petitioners:

Van E. McFarland

McFarland & Tondre

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
Summary of the Argument	7
Reasons for Denying the Writ	7
I. The Bankruptcy Court had jurisdiction to decide fraudulent conveyance claim.	8
II. As applied to the facts of this case, the determination of whether § 546(a) is jurisdictional or merely a statute of limitation is an academic exercise.	11
III. The Fifth Circuit correctly applied the law on the crediting of a settlement payment from a co-Defendant, and Petitioners failed to meet their burden to set aside the allocation of the settlement payment provided in the written release.	15
Conclusion	21

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 9

Davis, Gillenwater & Lynch v. Turner, __ U.S. __, 62 U.S.L.W. 3551 (1994) 9

Duck v. Munn (In re Mankin), 823 F.2d 1296 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 9

Granfinanciera, S.A. v. Norberg, 492 U.S. 33 (1989) 8, 9

Lovejoy v. Murray, 70 U.S. 1 (1865) 19

Martin v. First National Bank of Louisville (In re Butcher), 829 F.2d 596 (6th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988) 14

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 8

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 15

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 9

Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994) 9, 10

Contents

Page

Statutes Cited:

11 U.S.C. §§ 542-553 5

11 U.S.C. § 544 11

11 U.S.C. § 545 11

11 U.S.C. § 546 12

11 U.S.C. § 546(a) 3, 4, 7, 11, 12, 13, 14, 15

11 U.S.C. § 546(a)(1) 14

11 U.S.C. § 546(a)(2) 14

11 U.S.C. § 546(2) i

11 U.S.C. § 547 ..... 4, 11

11 U.S.C. § 548 .....3, 4, 5, 11, 13

11 U.S.C. § 553 11

11 U.S.C. § 1104 .....12, 13, 14

11 U.S.C. § 1123(b)(3) 3

11 U.S.C. § 1123(b)(3)(B) 12

11 U.S.C. § 1163 .....12, 13, 14

Contents

	Page
11 U.S.C. § 1202	13
11 U.S.C. § 1302	13
28 U.S.C. § 157(b)	2
28 U.S.C. § 157(b)(1)-(2)	8
28 U.S.C. § 157(b)(2)(F), (H)	8
28 U.S.C. § 158(a)	2
28 U.S.C. § 158(d)	2
28 U.S.C. § 1254(1)	2
Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150	11, 13

United States Constitution Cited:

Article III	3, 8, 9, 10

Rules Cited:

Bankruptcy Rule 7013	10
Federal Rule of Appellate Procedure 28(6)	17
Federal Rule of Civil Procedure 60(b)	6, 20
Supreme Court Rule 10	7

No. 94-1623

In The

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October Term, 1994

IN THE MATTER OF:
TEXAS GENERAL PETROLEUM CORPORATION,

Debtor.

VAN E. McFARLAND and McFARLAND & TONDRE,

Petitioners,

vs.

STEVEN A. LEYH, TRUSTEE OF THE LIQUIDATING TRUST OF TEXAS GENERAL PETROLEUM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, Steven A. Leyh, Trustee of the Liquidating

Trust of Texas General Petroleum Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Van E. McFarland and McFarland & Tondre.

OPINIONS BELOW

The Fifth Circuit Court of Appeals' opinion affirming the District Court's Memorandum Order that upheld the Bankruptcy Court's trial judgment, is reported at 40 F.3d 763, and is reproduced in Petitioners' Appendix. (App. 5, 45-64).

The Memorandum Order of the United States District Court for the Southern District of Texas, Houston Division upholding the Bankruptcy Court's trial judgment that Respondent had standing to bring the fraudulent conveyance action against Petitioners, is unreported and is reproduced in Petitioners' Appendix. (App. 4, 34-44).

The Findings of Fact and Conclusions of Law of the United States Bankruptcy Court for the Southern District of Texas, Houston Division, are reported at 122 B.R. 306, and are reproduced in Petitioners' Appendix. (App. 1, 19-26).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Fifth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 158(d). The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. § 158(a), and the jurisdiction of the Bankruptcy Court was invoked pursuant to 28 U.S.C. § 157(b).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners contend that Article III, Section 1 of the Constitution, 11 U.S.C. § 1123(b)(3) and 11 U.S.C. § 546(a) are involved.

STATEMENT OF THE CASE

This appeal involves a fraudulent transfer action, in which the parties stipulated to the Bankruptcy Court that the only issue to be tried, was whether the Respondent had standing to bring an 11 U.S.C. § 548 fraudulent transfer action by virtue of the conveyance of such action to the Respondent under a Chapter 11 Plan of Reorganization. Respondent is the Trustee of a Liquidating Trust that was established pursuant to a Reorganization Plan approved by the creditors of Texas General Petroleum (hereinafter the "Debtor"), and sanctioned through orders of the Bankruptcy Court.

Debtor filed its Petition for Relief on March 14, 1983, under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division. The Debtor proposed a Chapter 11 Liquidating Plan of Reorganization, which was confirmed by the Bankruptcy Court. The Reorganization Plan provided for the transfer of various assets of the Debtor, including certain causes of action, to a liquidating trust. These causes of action were described in Exhibit "B" to the Reorganization Plan, and the proceeds from such causes of action were to be disbursed for the benefit of the unsecured creditors of the Debtor. Certain other assets described in Exhibit "F" to the Reorganization Plan were not to be transferred to the liquidating trust, but were to be retained by the Debtor. The Reorganization Plan did not specifically address which entity would receive "the rest, residue and remainder" of

the causes of action that were not specified in either Exhibit "B" or Exhibit "F".

The Reorganization Plan was confirmed and Respondent was appointed as Trustee of the Debtor's Liquidating Trust in April 1985. The Liquidating Trust, acting through Respondent, initiated a fraudulent transfer[1] action against Petitioners on October 15, 1985 to recover $12,210.25 that the Debtor transferred to Petitioner McFarland & Tondre, a law firm, to pay for services rendered to a former officer of the Debtor's parent company. The payment was made seven (7) days prior to the Debtor's bankruptcy filing. Petitioners filed a Counterclaim and Third Party Claim in the Bankruptcy Court on April 25, 1986, and thereafter filed their Answer on May 8, 1986.[2]

Immediately prior to trial on March 31, 1989, Petitioners and Respondent filed a written stipulation with the Bankruptcy Court providing that the only issue to be tried was whether the Respondent lacked standing to assert the fraudulent transfer cause of action. The stipulation further provided that in the event such issue was determined in favor of Respondent, Respondent would be entitled to recover the amount of $12,210.25 from Petitioners. At the commencement of the trial, the Bankruptcy Court approved the parties' stipulation. The stipulation provided in pertinent part:

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1. Debtor, by and through Respondent, initially brought the action against Petitioners under 11 U.S.C. § 547. Since the cause of action was not a simple cash preference action, the Bankruptcy Court subsequently recharacterized such cause of action as a fraudulent transfer action under 11 U.S.C. § 548. (App. 4, 36). In the Second Amended Complaint, Respondent was substituted as the party asserting the action. (App. 5, 60).

2. On May 2, 1986, the Bankruptcy Court conducted a docket call but Petitioners failed to appear. The Bankruptcy Court entered a default judgment in favor of Respondent. The District Court reversed the default judgment. (App. 4, 36).

> The only defense the defendants [Petitioners] have or will assert as to plaintiff's [Respondent's] cause of action against defendants [Petitioners] under 11 U.S.C. § 548 is as follows: Plaintiff [Respondent] lacks standing for the reason that the cause of action under 11 U.S.C. § 548 was not conveyed to plaintiff [Respondent] by the Plan of Reorganization or related order creating the applicable trust and plaintiff [Respondent] is not otherwise the owner of the cause of action under 11 U.S.C. § 548.

(R. 273). Neither the Petitioners nor Respondent argued to the Bankruptcy Court that the Debtor's Reorganization Plan was ambiguous.

The Bankruptcy Court interpreted the contested language in the Reorganization Plan and concluded that such Reorganization Plan and the Order Confirming the Reorganization Plan had intended that causes of action not specifically addressed, including those causes of action in Bankruptcy Code Sections 542 through 553, to belong to Class 5 creditors and thus to the Respondent. Accordingly, the Bankruptcy Court found Respondent had standing to bring the 11 U.S.C. § 548 cause of action against Petitioners.

Pursuant to the parties' stipulation and based upon its Findings of Fact and Conclusions of Law, the Bankruptcy Court entered a judgment in favor of Respondent. The Petitioners appealed the Bankruptcy Court's judgment to the District Court. On July 1, 1990, the District Court issued a Memorandum Opinion and Judgment affirming the Bankruptcy Court's judgment. Petitioners did not initiate a timely appeal to the Fifth Circuit Court of Appeals.

On September 23, 1991, Petitioners filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b), claiming that they did not receive notice of the District Court's judgment. The District Court conducted an oral hearing on the Petitioners' Rule 60(b) Motion on December 6, 1991. On March 2, 1992, the District Court entered an order denying Petitioners' Rule 60(b) Motion. Thereafter, Petitioners instituted an appeal to the Fifth Circuit Court of Appeals based upon the District Court's declination of their Rule 60(b) Motion (Fifth Circuit Court of Appeals Cause No. H-92-2325). In May 1993, the Fifth Circuit dismissed Cause No. H-92-2325 based in part on the District Court's report to the Fifth Circuit that District Court Case Nos. H-90-1842 and H-90-2209 had never been consolidated. Therefore, there was not yet a final judgment on the fraudulent transfer action from which an appeal could be taken.[3] On September 10, 1993, the District Court entered a final judgment on the fraudulent transfer action and the Petitioners appealed to the Fifth Circuit Court of Appeals. In December, 1994, the Fifth Circuit Court of Appeals upheld the District Court's judgment.

While Petitioners' first appeal to the Fifth Circuit was pending, Respondent and the Petitioners' co-defendant, Brice A. Tondre (hereinafter the "Settling Defendant") entered into a Settlement Agreement in November, 1992. The Settling Defendant paid Respondent $10,000 to obtain a release of

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3. In fact, in the Record copy of the Memorandum Opinion of the District Court (App. 4, 34) the case style was "Civil Action No. H-90-1842 Consolidated with H-90-2209." (R. 181). Confusion may have been engendered after the default judgment had been taken in the Bankruptcy Court against Petitioners by Respondent on May 2, 1986. Petitioners instituted an appeal to the District Court of the default judgment and instituted a second appeal to the District Court of the Bankruptcy Court's related orders. The District Court in tracing the development of the case in its Opinion stated that "[t]he District Court, the Honorable G.K. McDonald, consolidated the appeals [relating to the default judgment] . . ." (App. 4, 36).

liability in connection with the judgment in the fraudulent transfer action, to obtain documents to release judgment liens recorded in Colorado and Texas, to release the Settling Defendant from sanctions sought from the Fifth Circuit or from any other courts, and to release the Settling Defendant from any claims (whether then in existence or later accruing) held by the Liquidating Trust of Texas General Petroleum or the Debtor. The Settlement Agreement allocated a portion of the settlement payment to the fraudulent transfer judgment. In December 1993, the District Court considered Petitioners' objection to the allocation of the payment made by the Settling Defendant. The District Court agreed with Respondent's position and sustained the allocation in the Settlement Agreement.

SUMMARY OF THE ARGUMENT

The three questions raised by Petitioners in this case are unique to the facts of the case and are unlikely to be replicated. The Fifth Circuit's opinion is not in conflict with other courts of appeal. The question concerning the construction of 11 U.S.C. § 546(a) is unlikely to arise again because of recent amendments to the Bankruptcy Code. The question concerning the crediting of a settling co-defendant's settlement payment does not involve a dispute over the appropriate legal standard but merely involves a specific fact situation in which the non-settling Defendants (Petitioners) failed to discharge their burden.

REASONS FOR DENYING THE WRIT

With respect to all three questions raised by Petitioners, under Rule 10 of this Court, there are no "special and important reasons" for granting a writ. Specifically, with respect to the facts of this case, the decision of the Fifth Circuit is not in conflict with the decisions of other courts of appeal. Finally, there are no important, unsettled questions of federal law presented by this case.

I.

THE BANKRUPTCY COURT HAD JURISDICTION TO DECIDE A FRAUDULENT CONVEYANCE CLAIM.

Petitioners incorrectly argue that the exercise of jurisdiction by the Bankruptcy Court over the Respondent's fraudulent transfer claim violated Article III of the United States Constitution. Petitioners can cite no decision of this Court or any courts of appeal's decisions in support of this contention.

Under 28 U.S.C. § 157(b)(1)-(2), bankruptcy courts may hear and determine all core proceedings arising under Title 11. Specifically, bankruptcy courts may hear proceedings to determine, avoid or recover preferences and fraudulent conveyances. 28 U.S.C. § 157(b)(2)(F),(H).

In trying to make a jurisdictional challenge, Petitioners seize upon the Fifth Circuit's discussion of this Court's dicta on public rights versus private rights in *Granfinanciera, S.A. v. Norberg,* 492 U.S. 33 (1989). However, this Court in *Granfinanciera* specifically stated that it was *not* expressing any view as to whether the jury trial ordered in that fraudulent transfer action could be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts, pursuant to the 1984 amendments to the Bankruptcy Code. 492 U.S. at 64.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), this Court indicated that where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right. This Court in later interpreting *Marathon* said that such case "establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a

traditional contract action arising under state law without the consent of the litigants. . . ." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985); *see also, Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). As the Fifth Circuit's opinion correctly notes, the fraudulent transfer action brought by Respondent against Petitioners is based upon federal law (a specific Bankruptcy Code provision), not state law.

The Fifth Circuit's opinion is in accord with several circuit courts of appeal that have held the Bankruptcy Court's exercise of jurisdiction over fraudulent transfer or preference claims is constitutional. *See, e.g., Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994).

The Petition for Certiorari filed in *Davis, Gillenwater & Lynch v. Turner* asked this Court to determine whether by having factual issues resolved by a non-Article III judge and reviewed on the clearly erroneous standard by a district court, the petitioners had been unconstitutionally deprived of the opportunity to have their case heard *de novo* by an Article III judge. The *Davis* petitioners' claim purportedly involved a "private right" under the dicta in *Granfinanciera*. Further, the *Davis* petitioners sought this Court's review of the circuit court's holding that although preferential and fraudulent transfer proceedings may involve private rights, the bankruptcy court had jurisdiction to adjudicate such suits in light of *Granfinanciera*. 62 U.S.L.W. 3513 (1994). This Court denied the petitioners' Petition for Certiorari in *Davis, Gillenwater & Lynch v. Turner*, __ U.S. __, 62 U.S.L.W. 3551 (1994). Petitioners seek to construct essentially the same jurisdictional challenge to the functioning of the bankruptcy courts.

Even though preference and fraudulent transfer proceedings may implicate private rights, several circuit courts of appeal have held that bankruptcy courts have jurisdiction to adjudicate fraudulent transfer claims because:

> (1) such proceedings are traditionally adjudicated by non-Article III courts;
>
> (2) the rights to avoid preference and fraudulent transfers is a congressionally-created right authorized under the Constitution over which Congress has greater discretion than with respect to state-created rights to assign them to non-Article III courts; and
>
> (3) compelling reasons exist for allowing the Bankruptcy Court, where property of the estate is garnered, to preside over actions that may augment the estate.

See, e.g., cases cited in *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1561 (10th Cir. 1993), *cert. denied*, __ U.S. __, 62 U.S.L.W. 3551 (1994).

Finally, Petitioners voluntarily invoked the jurisdiction of the Bankruptcy Court by filing a counterclaim against the Debtor's bankruptcy estate and a third-party claim. In fact, Petitioners filed their Counterclaim and Third-Party Claim on April 25, 1986, but did not file their Answer to Respondent's claims until May 8, 1986. It is especially instructive that under Bankruptcy Rule 7013, a third-party claim is not a compulsory counterclaim whereby the Petitioners could argue that they were forced to subject themselves to the Bankruptcy Court's jurisdiction. Petitioners voluntarily subjected themselves to the jurisdiction of the Bankruptcy Court by filing their third-party claim in the Bankruptcy Court.

II.

AS APPLIED TO THE FACTS OF THIS CASE, THE DETERMINATION OF WHETHER § 546(a) IS JURISDICTIONAL OR MERELY A STATUTE OF LIMITATION IS AN ACADEMIC EXERCISE.

Petitioners' question regarding whether 11 U.S.C. § 546(a) is jurisdictional or is merely a statute of limitation is rendered less significant because of the recent amendment of 11 U.S.C. § 546(a) by the Bankruptcy Reform Act of 1994. Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150.

When the Respondent initiated the fraudulent transfer action against Petitioners, 11 U.S.C. § 546(a) stated:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

The Bankruptcy Reform Act of 1994 amended 11 U.S.C. § 546(a) to establish the cutoff for filing actions under sections 544, 545, 547, 548 or 553 as of the earlier of:

> (1) two years after the entry of the order for relief;
>
> (2) one year after the appointment or election of the

> first trustee under section 702, 1104, 1163, 1202 or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph A; or
>
> (3) the time the case is closed.

Thus, the recent Bankruptcy Code amendments have addressed the situation presented by the Debtor's Chapter 11 where no trustee under section 1104 or 1163 is appointed, but a trustee acting under Bankruptcy Code § 1123(b)(3)(B) brings a fraudulent transfer action. The limitations period on a trustee under 11 U.S.C. § 1123(b)(3)(B) (assuming no trustee was appointed pursuant to §§ 1104 or 1163) would now be the earlier of two years after the order for relief or when the case is closed.

The Petitioners stipulated that the sole issue before the Bankruptcy Court was whether the Respondent had standing to bring the fraudulent transfer claim. Petitioners could have raised the limitations defense to the Bankruptcy Court but failed to do so and instead stipulated that the only issue was the Respondent's standing to bring the action. When Petitioners raised limitations on appeal, the Fifth Circuit said it *could* reach Petitioners' limitation argument only if that court determined that § 546 was jurisdictional. If such provision was not jurisdictional, Petitioners waived their limitations argument by virtue of their trial court stipulation that the only issue to be tried related to Respondent's standing to bring the fraudulent transfer claim under the Debtor's Reorganization Plan.

As applied to the facts of this case, the Petitioners' claims would have been decided the same under either the Sixth's Circuit's view that 11 U.S.C. § 546(a) is jurisdictional or the Fifth Circuit's view that 11 U.S.C. § 546(a) is merely a statute of limitation. In the Debtor's bankruptcy, there was no Trustee

appointment under sections 702, 1104, 1163, 1302 or 1202 of the Bankruptcy Code. Thus, the former § 546(a)'s only limitation on the commencement of a proceeding under 11 U.S.C. § 548, was the time the Debtor's bankruptcy case was closed or dismissed. Not only was the Debtor's bankruptcy case not closed or dismissed at the time Respondent filed the fraudulent conveyance action against Petitioners, but the Debtor's Reorganization Plan specifically provided:

> [s]pecifically as it relates to Section 546(a), the Case shall be deemed closed at and only at such time as all of the following have occurred: . . . (e) each and every adversary proceeding, including those initiated by . . . the Trustee upon assigned causes of action, shall have resulted in a final order; . . ."

(R. 182-83).

Petitioners' discussion incorrectly assumes that the Respondent's fraudulent transfer action was filed late. Petitioners quote the applicable former Bankruptcy Code section, which with respect to a Chapter 11 bankruptcy case provided that the cutoff for filing a fraudulent transfer case was the earlier of two years after the appointment of a trustee under section 1104 or section 1163, or the time the case was closed. However, Petitioners erroneously state that limitations on avoidance powers was two years after the filing of the Chapter 11 Petition.[4] (Petition for Writ at 15).

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4. While the 1994 amendments to the Bankruptcy Code now establish two years after the entry of the order for relief as a residual cutoff, the Bankruptcy Reform Act of 1994, P.L. 103-394, Title VII, § 702, 108 Stat. 4150, provided that (with certain exceptions not relevant to this case) the amendments did not apply with respect to cases commenced under Title 11 of

(Cont'd)

In this case, no "trustee" under any of the Bankruptcy Code sections enumerated in § 546(a)(1) had ever been appointed. Accordingly, the limitation period provided by 11 U.S.C. § 546(a)(2) allowed avoidance actions until the time such case had been closed or dismissed. Even if the Respondent were a "Trustee" as contemplated by Bankruptcy Code sections 1104 and 1163, Respondent was appointed on April 23, 1985 when the Reorganization Plan was confirmed.[5] The fraudulent conveyance action was filed on October 15, 1985, within two (2) years of the appointment of Respondent. The Debtor's bankruptcy case had neither been dismissed nor closed as of the filing of the adversary action against the Petitioners. In contrast to the Respondent's prompt institution of the fraudulent transfer action against Petitioners, the Sixth Circuit's precedent cited by Petitioners, *Martin v. First National Bank of Louisville (In re Butcher),* involved an adversary proceeding initiated two years and two days after the Trustee's appointment in Chapter 7 bankruptcy. 829 F.2d 596, 597 (6th Cir. 1987), *cert. denied,* 484 U.S. 1078 (1988). Even under the Sixth Circuit's view that § 546(a) is jurisdictional, the adversary action involving Petitioners was still timely filed.

The language in the Fifth Circuit's opinion to which Petitioners refer focused upon whether the Petitioners' stipulation at trial precluded their argument on appeal that

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(Cont'd)
the United States Code before the date of the enactment of the Amendments (October 22, 1994). Thus, the prior version of 11 U.S.C. § 546(a) controls this case.

5. The Reorganization Plan provided in ¶ 7.04 that "specifically as it relates to Section 546(a), the case shall be deemed closed at and only at such time as all of the following have occurred: . . . (e) each and every adversary proceeding, including those initiated by . . . the Trustee upon assigned causes of action, shall have resulted in a Final Order; . . . ."

limitations had run. If 11 U.S.C. § 546(a) is jurisdictional, Petitioners were entitled to raise the argument on untimely filing for the first time on appeal. The Fifth Circuit noted that the Sixth Circuit believed that (the former) § 546(a) was jurisdictional. However, Petitioners' claim on untimely filing would have been decided exactly the same way in the Sixth Circuit. Contrary to Petitioners' claim, as applied to the facts in this case, there would be no split between the Fifth Circuit and the Sixth Circuit.

III.

THE FIFTH CIRCUIT CORRECTLY APPLIED THE LAW ON THE CREDITING OF A SETTLEMENT PAYMENT FROM A CO-DEFENDANT, AND PETITIONERS FAILED TO MEET THEIR BURDEN TO SET ASIDE THE ALLOCATION OF THE SETTLEMENT PAYMENT PROVIDED IN THE WRITTEN RELEASE.

This Court's role is to take up unsettled legal issues that are "of importance to the public, as distinguished from that of the parties . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). The proceedings below contained many nuances leading to the Release between the Respondent and the Settling Defendant which are of interest to private litigants in this appeal.[6] However, the Fifth Circuit's treatment of how to credit a settlement payment offers no legal issues of import.

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6. For example, the Release between the Settling Defendant and the Respondent contained a recitation that the Settling Defendant had not authorized the filing of the appeal by the Petitioners:

> Whereas [Respondent] has agreed with [Settling Defendant] to accept his offer and has stated his intent to allocate $500 of the settlement amount to . . . [the judgment] in full satisfaction of the claims against

(Cont'd)

Petitioners wholly misstate and mischaracterize the Fifth Circuit's holding when they state that the Fifth Circuit held that a non-party to a settlement has to prove fraud to challenge the allocation of such settlement payment agreed to by the settling co-defendant. Under settled precedent cited by the Fifth Circuit, when Petitioners showed that the Respondent settled with another defendant on a claim for which they (the non-settling parties) were liable, the burden shifted to Respondent to offer proof that such settlement did not provide the Respondent with a double recovery. (App. 5, 63-64). Respondent discharged his burden by presenting not only the written settlement agreement with the Settling Defendant, but Respondent also raised the analysis adopted by the District Court that two different District Court cases were involved in the settlement reached between the Respondent and the Settling Defendant.

The Fifth Circuit merely stated that when the burden shifted, Petitioner McFarland suggested only that a recited consideration in the Release, the release of a motion for sanctions, amounted to fraud. (App. 5, 64). Of course, Petitioners improperly focused upon only one of the considerations recited in the Release.

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> [Settling Defendant] thereunder and in exchange for the agreement of [Settling Defendant] to dismiss his appeal of the United States District Court's order denying [Settling Defendant's] motion for relief of judgment docketed under Cause No. H-90-2325 in the United States Court of Appeals, Fifth Circuit **(which appeal was never authorized)**, and to allocate the amount of $9,500.00 to a complete release of any liability for sanctions requested by [Respondent] in its motion filed with the United States Court of Appeals, Fifth Circuit, around June 4, 1992 or from any other court . . ."

(Emphasis added).

Petitioners wholly misread the Fifth Circuit's opinion and seek to invoke this Court's review by incorrectly stating that the Fifth Circuit held that "a plaintiff does not have to provide evidence that the putative settled claim has value. Instead, a non-party to the settlement negotiations has to prove fraud." (Petition for Writ at 17).

Assuming *arguendo* that the release of the motion for sanctions to which Petitioners refer had been the only consideration for the Release with the Settling Defendant, the Petitioners still did not establish fraud. In fact, despite the mandate of F.R.A.P. 28(6), the argument section in Petitioners' Brief before the Fifth Circuit dealing with the allocation of the settlement payment issue, did not contain a single citation to the record. (Appellants' Brief in No. 93-2762, 36-37). Given the dearth of evidence presented by Petitioners, the Fifth Circuit properly declined to consider the fraud issue "absent additional evidence." (A5, 64).

In contrast, Respondent directed the Fifth Circuit's attention to the specific findings made by the District Court in its consideration of the settlement payment from the Settling Defendant. On December 21, 1993, the District Court considered the Appellants' (Petitioners') Motion to Reduce Supersedeas Bond in which the $10,000 payment made by the Settling Defendant was addressed. In rejecting Petitioners' arguments, the District Court made the following specific findings:

> *. . . Because of a settlement followed by payment of $10,000.00 by [Settling Defendant] in H-90-1842, a related case,* [Petitioners] request that the $21,000.00 supersedeas bond, the amount paid into the Court's registry for H-90-1842 and H-90-2209, be reduced to compliance with an order,

> be reduced to $11,000.00 and that the remaining $10,000.00 be released to [Petitioner] Van E. McFarland.
>
> [Respondent] responds, with a supporting copy of the settlement agreement in H-90-1842, that [Settling Defendant] paid $9,500.00 for a complete release of all joint and several liability of [Settling Defendant] for the full judgment amount and only $500.00 more that should be credited against the deposited money. [Respondent] requests that the motion be denied except for a reduction of the supersedeas bond by $500.00.
>
> After checking with the Court registry, the Court has verified that, in accordance with court orders, $1000.00 was deposited as a supersedeas bond in H-90-1842 and $20,000.00 in H-90-2209, because there was confusion whether the two cases had been consolidated. After reviewing the record this Court concurs with [Respondent].

(Emphasis added). In their Brief to the Fifth Circuit, Petitioners did not even address the District Court's analysis of how two separate District Court cases were involved in the settlement.

The Fifth Circuit correctly held that the burden of persuasion was on the party claiming the credit to show that the damages assessed against it have in fact and in actuality been previously covered. (A5, 63). Although the Fifth Circuit had no need to discuss the other consideration recited in the Release between the Settling Defendant and the Respondent, the motion for sanctions to which Petitioners' refer was *not* the entirety of the

consideration, as discussed below. In reviewing whether they discharged their burden, Petitioners omit salient facts surrounding the Release executed between the Respondent and the Settling Defendant.

Petitioners seem to argue that the Fifth Circuit analyzed the settlement credit issue using incorrect legal precedent and cite to this Court's decision in *Lovejoy v. Murray*, 70 U.S. 1 (1865) as somehow being inapposite of the Fifth Circuit's reasoning. While presumably directing this Court's attention to *Lovejoy's* holding that the law will not permit a plaintiff to recover twice for the same damages, Petitioners ignore this Court's application of the rule to the facts in that case, which analysis is equally applicable in this case: "it is not easy to see how he [Plaintiff/Respondent] is so affected, until he has received full satisfaction, or that which the law must consider as such." 70 U.S. at 17.

The Fifth Circuit's analysis of the settlement payment did not make new law. Rather, the Fifth Circuit merely reiterated precedent on how a court is to evaluate a claim that a plaintiff has received a double recovery by virtue of a settlement. When the plaintiff offers proof that the settlement does not provide a double recovery, the burden shifts to the non-settling defendant (in this case, the Petitioners). All that happened in this case is that Petitioners failed to discharge their burden.

Among the significant consideration for which the Settling Defendant paid the Respondent was a release of all claims (whether or not then known) by the Debtor and the Liquidating Trust of Texas General Petroleum Corporation. This global release was contained in the Release between Respondent and the Settling Defendant. Further consideration involved lien releases. The Release obligated Respondent to execute all necessary documents to release the liens recorded against the Settling Defendant in Jefferson County, Colorado and Harris County,

Texas. In exchange for the Settling Defendant's payment to Respondent, Respondent was agreeing to undertake additional burdens. Petitioners presented no evidence or argument to the District Court relating to the consideration unique to the Settling Defendant.

The sanctions motion to which Petitioners refer was filed in the prior appeal before the Fifth Circuit (Case No. H-92-2325) in which Petitioners sought relief from the District Court's denial of their Motion for Relief from Judgment. Petitioners fail to consider that the Release also covered possible sanctions motions before other courts.[7]

Petitioners did not even attempt to bring forth evidence that the various elements of consideration recited in the Release were not valuable to Settling Defendant. Instead, Petitioners narrowly directed the Fifth Circuit's attention to only one of the recited elements of consideration in the Release negotiated between the Respondent and the Settling Defendant, and cried "fraud." Petitioners chose to try to meet their burden by claiming fraud. The Fifth Circuit was absolutely correct to conclude that absent additional evidence, it would not hold the settlement proceeds allocation negotiated by the Respondent and the Settling Defendant, to be fraudulent.

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7. Given the unique circumstances of this case, Respondent's release of sanctions was meaningful to the Settling Defendant, an attorney. Sanctions motions had been urged early in the case below. One such Motion dealt with an attempt to serve discovery while the Bankruptcy Court's default judgment was on appeal to the District Court. Another Motion for Sanctions was filed in connection with Petitioners' Rule 60(b) Motion. While Petitioners are correct that the Fifth Circuit did not grant sanctions in connection with the motion specifically referenced in the Release, the Fifth Circuit's Order in connection with the referenced Motion did state that: "Appellants [Petitioners] are admonished to pay close attention to the Rules of this Court and to the FRAPs generally. Failure to follow these rules may lead to the dismissal of the appeal." (Fifth Circuit Order, June 26, 1992).

CONCLUSION

The Fifth Circuit's opinion is in accord with settled legal principles and presents no important unsettled questions of federal law. Accordingly, Respondent Steve Leyh, Trustee of the Liquidating Trust of Texas General Petroleum Corporation, prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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